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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

NO. 332

LEON JOHNSON, alias ROBERT McMILLAN,
Respondent,
v.
CHARLES L. DYE, Warden of the Allegheny County Jail, Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States.

The Commonwealth of Pennsylvania respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above case May 17, 1949, which reversed the Judgment of the District Court of the United States for the Western District of Pennsylvania, and discharged the petition for a writ of habeas corpus.

STATEMENT OF MATTER INVOLVED.

Leon Johnson was indicted in Cobb County, Georgia, for the murder of his paramour, Sarah Frances Thompson. He was found guilty with a recommendation of mercy on January 25, 1943, which recommendation under Georgia law, fixed the penalty at life imprisonment.

Six months later, in June of 1943, Johnson escaped and eventually came to Allegheny County, Pennsylvania, where he was apprehended. The Governor of Georgia issued a request to the Governor of Pennsylvania, who issued an executive warrant under which Johnson was arrested. Johnson sued out a writ of habeas corpus in Allegheny County, by which he charged:

1. He was improperly convicted in Georgia;

2. That the witnesses for the State of Georgia testified falsely because of intimidation;

3. That while he was in prison, he received brutal treatment from the prison guards and that his life will be endangered if he were returned to Georgia.

The Common Pleas Court of Allegheny County heard all of the evidence of the petitioner and his witnesses together with the evidence of the Chief of Police of Cobb County, Georgia, who testified that prisoners were not ill-treated; that no prisoner had died of violence or neglect; and that the Georgia "chain gang" was abolished three years prior to the petitioners sentence. The Common Pleas Court of Allegheny County was not convinced of the truth of Johnson's averment and dismissed the writ.

An Appeal was taken to the Superior Court of Pennsylvania which sustained the lower court (Common-

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wealth ex rel. Johnson v. Dye—159 Pennsylvania Superior Court 542) and concluded, after an exhaustive review of the Georgia conviction, that he was convicted properly and that it was "manifest that little or no reliance could be placed on the relator's evidence in the court below and that the record affirmatively shows him to be an untrustworthy witness."

Although appeals from the Superior Court of Pennsylvania are heard in the Supreme Court of Pennsylvania, no petition for such an appeal was filed but, instead, Johnson filed a new petition for a writ of habeas corpus in the District Court of the United States for the Western District of Pennsylvania, alleging that he was improperly found guilty of murder in Cobb County, Georgia, and that following his conviction, he was committed to a chain gang and was a victim of cruel, barbaric and inhuman treatment, which jeopardized his life and that if he is returned to Georgia, he will meet his death by mob violence or tortured to death by his jailors. Testimony was taken from the relator and other witnesses confined in the Allegheny County Jail at that time, all of whom except one were escaped prisoners from Georgia, but no testimony was introduced by the Commonwealth of Pennsylvania on behalf of the State of Georgia. After hearing petitioner and his witnesses, petition for a writ of habeas corpus was discharged, following which, an appeal was taken to the United States Court of Appeals for the Third Circuit which reversed the District Court and found that Johnson suffered cruel and unusual punishment at the hands of the employees of the prison system of Georgia and that such action on the part of the employees was the action also of the State of Georgia which, in turn, was a violation of the 8th

Amendment of the United States Constitution as implemented by the 14th Amendment, and discharged the prisoner.

A petition for stay of mandate was presented by the Commonwealth of Pennsylvania, pending a petition for writ of certiorari to the United States Court of Appeals for the Third Circuit, which, on May 27, 1949, ordered the mandate stayed.

Subsequently the District Attorney of Allegheny County filed a motion for leave to file a petition for rehearing out of time. A similar motion was filed by the Attorney General of Pennsylvania. A motion for leave to intervene was filed by the State of Georgia, alleging lack of notice of the proceedings, particularly, lack of notice of an invitation by the Circuit Court to appear and argue Amicus Curiae.

All motions were denied.

JURISDICTION.

The jurisdiction of this court is invoked under Title 28, Section 1254 of the United States Code.

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QUESTIONS PRESENTED.

1. Did the Circuit Court err in refusing to adhere to doctrine of exhaustion of state remedies by permitting federal jurisdiction in a habeas corpus proceeding where escaped murderer had remedy by appeal from decision of two lower state courts to highest court of state but did not utilize such remedy.

2. Did the Circuit Court err in holding that the fourteenth amendment incorporates or implements the eighth amendment principles thereby applying eighth amendment restrictions to the states?

3. Did the circuit court err in using the standards for cruel and unusual punishment under the Eighth Amendment to mark the limitations upon the states provided by the Fourteenth Amendment?

4. Where the Circuit Court reversed the District Court on the question of inclusion of Eighth Amendment principles in the Fourteenth Amendment, did the Circuit Court err in not remanding the case to the District Court for an opportunity to introduce testimony as to treatment of prisoners in Georgia prisons, which evidence on the question of cruel and barbarous treatment became relevant for the first time?

5. Did the Circuit Court err in making a finding of cruel and unusual punishment when no conclusive statement of such a finding was made by the District Court?

6. Was there sufficient evidence in the record to permit the Circuit Court to conclude that the petitioner suffered cruel and unusual punishment particularly since evidence of this nature was not considered relevant by the District Court Judge?

7. Assuming that the Circuit Court is right in applying the eighth amendment by implementation of the fourteenth amendment, to the states, is the Circuit Court correct in extending the scope of the amendment to actions of employees of a prison which heretofore was limited to the actions of legislative bodies and judges of the court.

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REASONS FOR ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has decided an important question of federal law in a way that is probably in conflict with the applicable decisions of this Court in reference to the scope of the eighth amendment to the constitution of the United States.

The Supreme Court has closed the issue on whether the fourteenth amendment is shorthand for the first eight amendments and thereby incorporates them (*Wolf v. Colorado,* 17 Law Week 4538; *Adamson v. California,* 322 U. S. 46) yet in the instant case the Circuit Court decides that the cruel and unusual punishment clause in the eighth amendment is implemented by the fourteenth amendment and therefore applies to the states.

The opinion is not predicated upon the fourteenth amendment which prohibits states from actions not implicit in the concept of ordered liberty. (*Palko v. Connecticut* 302 U. S. 319).

The Circuit Court cites *Weems v. United States,* 217 U. S. 349, a case involving a statute prescribing imprisonment in claims violating the Eighth Amendment of the Constitution as a measure of what constitutes cruel and unusual punishment in the instant case.

2. The Circuit Court has decided that another federal question in conflict with applicable decisions in this court by holding that the Eighth Amendment of the Constitution goes further than limiting the legislative bodies and Judges of the courts, *Weems v. U. S., supra,* although holding that a statute prescribing punishment in chains violated the Eighth Amendment made clear

that the Amendment applies only to lawmaking bodies and to judges of the courts (*Weems v. U. S.* 217 at 409). It has also been decided in *Francis v. Reswebber,* 329 U. S. 459, that the penological policy of a state court is not to be tested by the scope of the Eighth Amendment.

3. The majority of the Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision in that it invaded the promise of the lower court, who made no finding of cruel and unusual punishment and the Circuit Court of its own accord with no further evidence introduced or no opportunity to see the witnesses made a new finding of fact unsupported by evidence and contrary to the conclusion reached by the Common Pleas Court of Allegheny, the Superior Court of Pennsylvania and the District Court of the United States for the Western District of Pennsylvania.

4. The Circuit Court of Appeals has rendered a decision in an important federal question of law probably in conflict with applicable decisions of this Court and the statute in determining that habeas corpus cases involving questions of constitutional guarantees, need not comply with the doctrine of exhaustion of states remedies which is not in accord with, or distinguished from this Honorable Court's opinion in *Jack O'Lee Young v. Joseph E. Ragen,* #50 October Term, 1948, decided June 6, 1949, (17 United States Law Week 4476), following the instant decision, which requires scrupulous adherence by all Federal courts to the doctrine of exhaustion of state remedies in habeas corpus cases.

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5. The Circuit Court has rendered a decision deciding an important question of local law in a way probably in conflict with applicable local decisions and practices.

It has always been the sovereign right of the Commonwealth of Pennsylvania to administer the operation of its prisons, jails, mental asylumns, training schools for juveniles and similar institutions without supervision from Federal Courts or other agencies of the Federal government.

When conditions are discovered, as they have been, which indicate that an inmate of any institution within the Commonwealth has been improperly or harshly treated by any executive or employee of any institution, the Commonwealth of Pennsylvania through its established laws, investigates and can and has discharged from employment the guilty parties and in many cases have caused indictments to be found.

6. The Circuit Court has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on the same matter by holding that the doctrine of exhaustion of state remedies does not apply to extradition proceedings; as was held to apply in the first circuit case of *Lyon v. Harkness* 151 F 2d 731, certiorari denied, 321 U. S. 182.

PRAYER.

WHEREFORE, your petitioner prays that a Writ of Certiorari be issued under the seal of this court directed to the United States Court of Appeals for the Third Circuit, commanding said Court to certify and send to this court the transcript of the record, in the above entitled cause, being No. 9471 October Term, 1947 in that Court, and that the record and judgment of said Court be considered to the end that said cause may be reviewed and determined and that the judgment of the United States Court of Appeals for the Third Circuit, be reversed and the cause remanded for further proceedings according to law.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the Court of Appeals for the Third Circuit (R. ....) was filed May 17, 1949. The opinion is reported in the advance sheets at 175 F2 250. The opinion of the District Court (R. ....) is reported at 71 Federal Supplement 262. The opinion of the Superior Court of Pennsylvania is reported 49 Atlantic 2nd page 197.

Jurisdiction.

The jurisdiction of this Court is invoked under Title 28, Section 1254, of the United States Code.

Specification of Error.

The lower court erred in reversing the judgment of the Court below, as follows (R. ....).

Accordingly the judgment of the Court below will be reversed and the cause will be remanded with the direction to issue the writ and discharge the prisoner.

Argument.

The United States Court of Appeals for the Third Circuit has arrived at a conclusion of law not heretofore decided by the Supreme Court, by accepting as a finding of fact, matter insufficiently proved and not part of critical finding of the court below, and incorrectly appraising the law concerning the assumed fact.

CIRCUIT COURT SUBSTITUTES OWN FINDINGS OF FACT.

The Circuit Court denounces torture and brutality to prisoners; claims such treatment in a state prison violates the Eighth Amendment to the Constitution as implemented by the Fourteenth.

But, as the minority opinion points out (R. ....), the "majority . . . not only substitutes its own findings of fact for an inconclusive statement of the Court below, but also deems no conclusion possible other than Johnson suffered cruel and unusual punishment prior to his flight from Georgia."

Before the Court, in this case, decided so emphatically that the Fourteenth Amendment to the Constitution incorporated the "cruel and unusual punishment" clause of the Eighth Amendment against the States, it should have first before it sufficient evidence to support a finding that Johnson suffered brutal treatment and that such particular treatment was contemplated in the Eighth Amendment as a violation thereof.

The Circuit Court grasps at certain words of the District Judge which he wrote in dismissing consideration of certain evidence he did not deem relevant to the case.

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The District Judge said (R. ....):

"There is evidence that Johnson received cruel treatment * * * However, such treatment would not entitle him to his liberty as it does not constitute a custody of relator in violation the Constitution or laws of the United States 28 U.S.C. 453. The Eighth Amendment is not a limitation upon the States. *Collins v. Johnson,* 237 U. S. 502, 510-511."

Clearly the District Court made no finding of cruel treatment; only that such testimony was offered but not necessary to consider since it wasn't relevant.

But the majority opinion of the Circuit Court quotes the above from the trial and continues (R. ....)

"We deem the first sentence quoted in this paragraph constitutes a finding by the court below that Johnson had been subjected to cruel treatment following his conviction. It is obvious also that in using the phrase "cruel treatment" the court below was referring to the cruel and unusual punishment provision of the Eighth Amendment."

"Without regard for minutiae of conclusion in the trial court's opinion we think it misinterpreted the ruling of the Supreme Court in Collins v. Johnson, Supra."

If the lower court erred in its conclusion concerning the limits of the application of the Eighth Amendment as the Circuit Court suggests, then the Circuit Court should have remanded the case, for testimony of 'cruel' treatment with instructions to make a finding thereon. This was the conclusion (R. ....) of the minority.

Such an order of remand would enable the Commonwealth of Pennsylvania to introduce evidence from prison and police authorities of the State of Georgia (there was no such evidence in this case at any state of the Federal Court proceedings) as was done in the recent N. Y. Supreme Court case of *Jackson v. Ruthazer* (reported N. Y. Law Journal, June 21, 1949, page 2204). The relator in the Jackson case, relying on the Circuit Court opinion of *Johnson v. Dye,* testified to outrageous brutalities and submitted magazine articles (such as were introduced in the District Court proceedings of the instant case) describing one time conditions in Georgia prisons. Following the testimony of Georgia officials and introduction of prison records, the New York Court stated:

> "The conclusion is that relator has failed to prove the acts of brutality or of the cruel or inhuman punishment claimed and that if returned, he will be subjected to cruel and inhuman treatment, or be placed in grave danger of bodily injury or death. On the contrary, the evidence on behalf of the State of Georgia shows that the relator has been accorded due process of law and if returned, will not be subjected to cruel and inhuman treatment or brutal and unusual punishment."

To remand the instant case for a critical finding of fact based upon evidence would have relieved the Circuit Court of invading the province of the court below as was stated in the minority opinion (pp. 14-15):

> "True, several witnesses testified to 'the known facts concerning the working of the Georgia penal system at the time of the petitioner's sentence'; but, in the court below, only one witness professed

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to actual knowledge of how Johnson, and not chain-gang prisoners in general, was treated: Johnson himself. I think that Johnson may well have told substantial truth when he described his chain-gang ordeals; and I think the district court had ample basis for making such a critical finding of fact; but I see no reason why this court should invade the province of the court below and insist that credibility be attached to Johnson's testimony. It must be recalled that the burden of proof of his allegations lay with Johnson, whose testimony is to be viewed in the light that he has a vital interest in the outcome, and who has been disbelieved by other courts.[2] The case at bar seems to me one particularly appropriate for adherence to the usual procedure of leaving the finding of facts to the court of first instance."

FOURTEENTH AMENDMENT NOT SHORTHAND FOR FIRST EIGHT.

Notwithstanding the celebrated decisions in *Twining v. New Jersey*, 211 U. S. 78; *Palko v. Connecticut*, 302 U. S. 319; *Adamson v. California*, 332 U. S. 46, and *Hurtado v. California*, 110 U. S. 516—all clearly separating the rights guaranteed under the Fourteenth Amendment against the States from those rights guaranteed

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2. At his murder trial in Georgia, Johson limited his defense to his written statement alleging that the homicide was accidental; but the jury found him guilty of murder. As to Johnson's testimony in his habeas corpus hearing in the Court of Common Pleas of Allegheny County, the Superior Court of Pennsylvania stated that the record "affirmatively shows him to be an untrustworthy witness." 49 A. 2d at page 197."

against the Federal Government in the first Eight Amendments to the Constitution, the Circuit Court ignores the well settled distinctions and decides that certain restrictions in the first Eight Amendments are "implemented by reason of operation of the Fourteenth Amendment."

The Circuit Court says (R. . . . .) under the following heading:

> "As to the Application of the Eighth Amendment of the Constitution of the United States by Implementation Under the Fourteenth Amendment."
>
> "We are not called upon to decide, nor do we decide, whether *the clauses of the Eighth Amendment* relating to *imposition* of excessive bail, or excessive fines, fall *within* the ambit *of the Fourteenth Amendment.* But we entertain no doubt that the Fourteenth Amendment prohibits the *infliction of cruel and unusual punishment by a state."* (Emphasis ours)

The Twining case cautions about new limitations on the states, and says that such limitations are a matter of grave import—yet are enforced by the Supreme Court. However, the opinion states at page 93:

> "it is recognized by counsel, that by a long line of decisions, the first ten amendments are not operative on the states. Barrow v. Baltimore, 7 Pet. 243; Spies v. Illinois, 123 U. S. 131; Brown v. N. J., 175 U. S. 172; Barrington v. Missouri, 205 U. S. 483."

In *Collins v. Johnston,* 237 U. S. 502, 510, Mr. Justice Pitney speaks:

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"The Eighth Amendment is also invoked, with its prohibition of cruel and unusual punishments; but, as has been pointed out, this is a limitation upon the Federal Government, not upon the States."

Adamson v. California, 332 U. S. 46, though Mr. Justice Reed—follows Twining case and strengthens it —at P. 53 states:

"The due process clause of the Fourteenth Amendment, however, does not draw all the rights of the Federal Bill of Rights under its protection."

Mr. Justice Frankfurter in the concurring opinion in the Adamson case says the Twining case is an outstanding opinion of this Court and "should not now be diluted, either in its judicial philosophy or in its particulars."

At page 67 Mr. Justice Frankfurter says:

"Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English speaking peoples even toward those charged with the most heinous offenses. * * * *The judicial judgment* in applying the Due Process Clause *must move within the limits of accepted notions of justice and is not to be based upon the idosyncrasies of a merely personal judgment.* * * * An important safeguard against such merely individual judgments is an *alert deference to the judgment of the State Court under review.* (Emphasis ours)

In *Wolf v. Colorado* — decided June 27, 1949 — 17 U. S. Law Week 4638—Mr. Justice Frankfurter stated:

> "The notion that the 'due process of law' guaranteed by the Fourteenth Amendment is short-hand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this court again and again, after impressive consideration. See e.g. Hurtado v. California, 110 U. S. 516; Twining v. New Jersey, 211 U. S. 78; Brown v. Mississippi, 297 U. S. 278; Palko v. Connecticut, 302 U. S. 319. * * * The issue is closed."

EIGHTH AMENDMENT NOT VIOLATED.

Even if the Court were right in implementing a clause in the Eighth Amendment by operation of the fourteenth, it would not warrant the decision arrived at in this case because yet to be determined is: (A) what is cruel and unusual punishment, as meant in the Eighth Amendment, and (B) who is prohibited from offering such treatment by the Eighth Amendment?

The State of Georgia in imposing a life sentence for murder is not guilty of offering cruel punishment.

It is clear from the dissenting opinion of Justices White and Holmes in *Weems v. U. S.*, 217 U. S. 349 at 409, that the amendment refers only to judges and legislatures, not to be invoked to permit persons convicted of crime to escape penalty because of an alleged wrongdoing of a prison employee. Even the Circuit Court finds no fault with the penalty prescribed by the Georgia law and imposed by the Court.

The dissent in the *Weems* case, particularly referred to by Mr. Justice Frankfurter in his opinion in Francis

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v. Reswebber (329 U. S. 459), did not find that use of chains on prisoners violated the Eighth Amendment (where it applied). Justice White, and he was concurred in by Justice Holmes, stated (at p. 412):

> "I do not assume that the mere fact that a chain is to be carried by the prisoner causes the punishment to be repugnant to the bill of rights * * *. Such a provision may well be part of the ordinary prison discipline, particularly in communities where jails are insecure * * *."

And further at p. 409:

> "* * * Cruel, as used in the Amendment, forbids only the law-making power, in prescribing punishment for crime, and the courts in imposing punishment, from inflicting unnecessary bodily suffering through a resort to inhuman methods for causing bodily torture, like or which are of the nature of the cruel methods of bodily torture which had been made use of prior to the Bill of Rights of 1689, * * * The word 'unusual' accomplished only three results: First, it primarily restrains the courts when acting under the authority of a general discretionary power to impose punishment, such as was possessed at common law, from inflicting lawful modes of punishment to so unusual a degree as to cause the punishment to be illegal, because to that degree it cannot be inflicted without express statutory authority; second, it restrains the courts in the exercise of the same discretion from inflicting a mode of punishment so unusual as to be impliedly not within its discretion, and to be consequently illegal in the absence of express statutory authority; and, third, as to both the foregoing, it operated

> to restrain the lawmaking power from endowing the judiciary with the right to exert an illegal discretion as to the kind and extent of punishment to be inflicted."

It was the majority opinion in this case (the Weems case) on which the Circuit Court depended for a definition of cruelty under the Eighth Amendment.

The Circuit Court did not take into account that the decision of the *Weems* case construed a statute providing such punishment under a Constitution which prohibited cruel and unusual punishment.

The United States Supreme Court in *Frances v. Reswebber,* 329 U.S. 459, makes a clarifying statement by Mr. Justice Frankfurter who stated p. 470):

> "But the penological policy of a state is not to be tested by the scope of the Eighth Amendment and is not involved in the controversy which is necessarily evoked by that Amendment as to the historic meaning of 'cruel and unusual punishment.' See Weems v. United States 217 U. S. 349, and particularly the dissenting opinions of White and Holmes."

Any other conclusion would automatically charge the United States Supreme Court with the supervision of all state prisons and would permit those who have been convicted of crime to gain release if illegally abused by prison attendants. The present practice of local and state authorities is to investigate such abuses, discharge or indict the parties responsible for the bad treatment of inmates, not only of jails and penitentiaries but reformatories, mental asylums, juvenile training schools and the like.

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As was said by Mr. Justice Moody in *Twining v. N. J.* 211 U. S. at 91:

> "In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: first, that the exemption from compulsory self-incrimination is guaranteed by the Federal Constitution against impairment by the states; and, second, if it be so guaranteed, *that the exemption was in fact impaired in the case at bar.*" (Emphasis ours)

STATE REMEDIES FOR HABEAS CORPUS NOT EXHAUSTED.

There was no jurisdiction in the Federal Court since the state remedies were not exhausted. The petitioner for the writ of habeas corpus first applied in the Common Pleas Court of Pennsylvania and was denied his release and remanded for return to Georgia. His appeal to the Superior Court affirmed the lower court. No petition for a reargument in the Superior Court was asked. No appeal or petition to the Supreme Court for allocatur followed.

Pennsylvania laws provide for an appeal in habeas corpus by petition for allocatur. (*Commonwealth ex rel, Oveido v. Buldi,* 347 Pa. 601)

Furthermore the Supreme Court has original jurisdiction in habeas corpus. (*Commonwealth ex rel Townsend v. Burke,* 361 Pa. 35)

The Act of 1836 June 16, P. L. 784 S. 7; 17 Purdon Statutes 48 provides:

> "The judges of the Supreme Court shall have full power and authority, when, and as often as there may be occasion, to issue writs of habeas corpus, writs of certiorari and all remedial and other writs and process, returnable to the said Court."

The Act of 1836 June 16, P. L. 784 S. 1, 17 Purdon Statutes 41 provides:

"The Supreme court of this commonwealth shall have power to hear and determine all, and all manners of pleas, plaints and causes which shall be brought, or removed there from any other court of this commonwealth, by virtue of any writ or process issued by the said court, or any judge thereof, for that purpose, in the manner now practised and allowed, to examine and correct all and all manner of errors of the justices, magistrates, and courts of this commonwealth in the process, proceedings, judgments and decrees, as well in criminal as in civil pleas or proceedings, and thereupon, to reverse, modify, or affirm such judgments and decrees, or proceedings, as the law doth or shall direct; and generally, to minister justice to all persons, in all matters whatsoever, as fully and amply, to all intents and purposes, as the said court has heretofore had power to do, under the Constitution and laws of this commonwealth; and shall have power, and is required to issue execution, or other process, for the recovery of costs which have accrued, or may accrue in said supreme court, as well as in all cases which have been heretofore decided."

To avoid applying the clear and settled statements of law by this Honorable Court and the statutes enacted by Congress[1] that state remedies must be exhaused be-

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[1] Existing laws as declared by Ex Parte Hawk was made part of the statute by the New Judicial Code, 28 U. S. C. S. 2254, which provides:

"An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court shall not be granted unless it appears

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fore federal jurisdiction applies, the circuit court attempts to distinguish the instant case from *Ex Parte Hawk,* 321 U. S. 114 and from the subsequent (to the Circuit Court's decision in the Johnson case) decision of *Jack O'Lee Young, petitioner v. Ragen, Warden,* at No. 50 October Term, 1948, June 6, 1949. The Circuit Court calls the instant case an extradition case and says the rule therefore does not apply.

In support of this position, the circuit court cites a line of habeas corpus cases arising out of extraditions under old Title 18 section 662, of the U. S. C. A. (now section 3182 of Title 18 U. S. C. A.) under which a federal habeas corpus is allowed when governors of one state or territory are demanding a fugitive's return for trial. Such a habeas corpus tests the regularity of the procedure, the identity of the prisoner, and whether a crime had been committed in the demanding state. The cases cited follow.

In *Roberts v. Reilly,* 116 U. S. 80, the relator complained of the sufficiency of the indictment and averred he was not present in the demanding state at the time alleged;

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that the applicant has exhausted the remedies available in the courts of the state, or that there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

An applicant shall not be deemed to have exhausted the remedies available in the Courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented."

In *Biddinger v. Commissioner*, 245 U. S. 128, relator claimed he was not a fugitive since he was not in the demanding state at the time alleged;

In *Hogan v. O'Neill*, 255 U. S. 52, relator alleged that indictment did not sufficiently charge him with a crime;

In *Drew v. Thaw*, 235 U. S. 42, the question was whether a crime was charged in the indictment;

In *U. S. v. Meyering*, 75 F. 2d 716, there was no copy of the indictment with the extradition papers;

In *United States v. Sup't of County Prisons*, 111 F. 2d 409, the relator alleged no crime was charged in the indictment.

The regularity of the procedure by which the state or territory can demand fugitives from an asylum state or territory for trial in the demanding state is all that is contemplated by habeas corpus under that provision.

Not so in the instant case.

The instant case concerns itself primarily with rights guaranteed by amendments to the United States. The Federal extradition law is not in issue—nor is there any attack on the regularity of the extradition proceedings.

The instant case involves the identical question raised in *Ex Parte Hawk*, 321 U. S. 114 where the petitioner claimed that he was not adequately represented by counsel when forced to trial.

In a per curiam opinion the Court said:

"We cannot say that he is not entitled to a hearing on these contentions. But as was pointed out, peti-

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tioner has not yet shown that he has exhausted the remedies available to him in the state courts, and he is therefore not at this time entitled to relief in a federal court or by a federal judge."

Hawk had been denied a writ of Habeas Corpus by the Illinois Supreme Court but still could apply to the lower court and still had available a common law writ of Coram Nobis. The Supreme Court said:

"Until that remedy has been sought without avail we cannot say that petitioners' state remedies have been exhausted."

And the United States Supreme Court denied his petition for a writ of habeas corpus without prejudice.

The Hawk case was followed and approved by *Young v. Ragen, Warden,* No. 50 October Term, 1948, decided June 6, 1949, 17 U.S. Law Week 4476, where the Chief Justice said:

"Unless habeas corpus is available, therefore, we are led to believe that Illinois offers no post-trial remedy in cases of this kind. The doctrine of exhaustion of state remedies, to which this court has required the scrupulous adherence of all Federal Courts, see ex parte Hawk, 321 U. S. 114; and all cases cited, presupposes that some adequate state remedy exists."

Chief reliance was placed by the Circuit Court on the case of *U. S. v. Meyering,* 75 F. 2d 716, to remove the instant case from the doctrine of exhaustion of state remedies.

In the Circuit Court opinion the majority says:

"It was held by the Court of Appeals for the Seventh Circuit in United States v. Meyering, 75 F. 2 716, 718, that if a petitioner had begun a proceeding in a state Court for habeas corpus he could nevertheless discontinue that proceeding and file his petition for relief in a federal district court."

The opinion does NOT say this.

In the Meyering case the petitioner DID EXHAUST HIS STATE REMEDIES. The Supreme Court of Illinois had turned him down. The Circuit Court there said, obiter dicta, that (under the extradition statute) the petitioner might have petitioned the United States Supreme Court for certiorari to the Supreme Court of Illinois instead of filing a petition for habeas corpus in the District Court, or he could abandon his proceedings begun in the State Court by not petitioning the United States Supreme Court for a certiorari to the Illinois Supreme Court at any stage after applying for certiorari and by commencing a habeas corpus in the District Court.

It did not say that petitioner could abandon his state remedies at any stage in the State Courts and receive relief from Federal courts.

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CONFLICT OF CIRCUITS.

In the case of *Lyman v. Harkness,* 151 F. 2d 731, in a per curiam opinion the Court of Appeals of the 1st Circuit affirmed the lower courts refusal to grant a writ of habeas corpus on grounds of violation of U. S. Constitution because the prisoner failed to apply in the State Court for such a writ to avoid extradition from New Hampshire. The court said that *Ex Parte Hawk, supra,* applies.

In *Kaufmann v. Mount, Sheriff,* 131 F. 2d 112, the Court of Appeals for the 5th Circuit refused a writ of habeas corpus arising out of interstate extradition.

Respectfully submitted,

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